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No. 86-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CORRECTED COPY

GWALTNEY OF SMITHFIELD, LTD.,

Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,
and
NATURAL RESOURCES DEFENSE COUNCIL, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL WILDLIFE FEDERATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	PAGE
STATEMENT OF INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Congress gave citizen plaintiffs the authority to seek civil penalties for past violations of the Act in order to deter specifically and generally future violations	3
A. Citizen enforcement of the Refuse Act: *qui tam* actions	7
B. Congressional hearings on predecessor bills to S. 2770 and the evolution of the Clean Water Act citizen action for civil penalties	12
1. The 1970 bills & hearings	12
2. The 1971 bills & hearings	15
II. The broad deterrent purposes of the Clean Water Act would be thwarted by a complicated jurisdictional bar to judicial discretion to assess civil penalties in the absence of continuing violations	19
III. Conclusion	22

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TABLE OF AUTHORITIES

PAGE

Cases

Anderson v. *Norfolk & Western Railway*, 349 F.Supp. 121 (D.Va. 1972) 17

Bass Anglers Sportsman's Society of America v. *Scholze Tannery, Inc.* 329 F.Supp. 339 (D.Tenn. 1971) 17

Bass Anglers Sportsman's Society of America v. *U.S. Plywood-Champion Papers, Inc.*, 324 F.Supp. 302 (D.Tx. 1971) 17

Chemical Mfr's Assoc. et al. v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985) 3

Chesapeake Bay Foundation v. *Gwaltney of Smithfield, Ltd.*, 611 F.Supp. 1542 (E.D. Va., 1985) 20,21

E.I. duPont de Nemours & Co. et al. v. *Train*, 430 U.S. 112 (1977) 3

Enquist v. *Quaker Oats Co.*, 327 F.Supp. 347 (D.Neb. 1971) 17

Environmental Protection Agency v. *Nat'l Crushed Stone Assoc. et al.*, 449 U.S. 64, (1980) 3

Tull v. *U.S.*, 55 U.S.L.W. 4571 (U.S. Apr. 28, 1987) 3,4

Train v. *Colorado Public Interest Research Group, Inc. et al.*, 426 U.S. 1 (1976) 3

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U.S. v. *Standard Oil Co.*, 384 U.S. 224 (1966) 7

U.S. v. *Republic Steel Corp.*, 362 U.S. 482 (1960) 7

Wyandotte Transp. Co. v. *U.S.*, 389 U.S. 191 (1967) 7

Weinberger v. *Romero Barcelo*, 456 U.S. 305 (1982) 20

Statutes

Clean Air Act, 42 U.S.C. § 7401 et seq. 4,15

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The Establishment of a National Industrial Wastes Inventory: Hearings Before the Conservation & Natural Resources Subcomm. of the House Comm. on Government Operations, 91st Cong., 2nd Sess. (Sept. 17, 1970) 6,7,8,11

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Environmental Protection Agency, "Civil Penalty Policy" [Federal Laws] *Env't Rep.* (BNA) 41:2991 20

H. Lieber, *Federalism and Clean Waters: The 1972 Water Pollution Control Act* (1975) 5,6

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BRIEF AMICUS CURIAE OF THE NATIONAL WILDLIFE FEDERATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

With written consent of the parties,[1] the National Wildlife Federation ("NWF") respectfully submits this amicus curiae brief pursuant to Supreme Court Rule 36.2. NWF is the nation's largest, not-for-profit, conservation organization with over 4.6 million members, contributors and supporters and has 49 affiliated state organizations. The question before the Court is whether citizen plaintiffs suing violators of the Clean Water Act under section 505(a) must, as a jurisdictional matter, allege and prove that the asserted violations are continuing at the time the action is filed. This issue implicates the efficacy of the role of citizens and citizen groups like NWF in using Clean Water Act § 505(a) to abate water pollution by deterring future violations.

1. The consent letters have been filed with the Clerk of this Court.

As a citizen group which has in the past prosecuted citizen enforcement actions under § 505(a), NWF is concerned that this section be interpreted to discourage violations of the law.

SUMMARY OF ARGUMENT

Section 505(a) of the Clean Water Act ("CWA" or "the Act") was intended by Congress to give citizens a vital role in abating water pollution through the prosecution of citizen enforcement actions. To that end, Congress specifically authorized citizens to file enforcement suits against violators in which civil penalties could be assessed for past violations.[2] In this way, Congress enlisted the aid of concerned citizens in stopping specific violations and, just as important, in deterring generally violations of the Act.

Congress also recognized that the circumstances involving particular violations might warrant a civil penalty less than the statutory maximum or, perhaps, no penalty at all. Congress authorized the federal district courts to exercise discretion in determining the appropriate penalty amount. Therefore, where violations have ceased at the time of the filing of a citizen suit complaint, a court can fashion the appropriate remedy—as the district court did here—considering, *inter alia*, how the specific and general deterrence policies of the Act will best be served.

The reading of section 505(a) urged upon the Court by Petitioner would supplant this judicial discretion with a complicated, jurisdictional bar to all citizen suits for penalties involving violations that have ceased when the complaint is filed. This jurisdictional bar would preclude citizen actions for penalties in such cases regardless of whether the purposes of the Act would be served by a civil penalty remedy.

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2. Petitioner does not contend that citizens are barred from seeking to assess civil penalties for past violations. Rather, Petitioner argues that this authority is ancillary to the authority to obtain injunctive relief against continuing violations. Therefore, according to Petitioner, citizen plaintiffs must allege and prove that a violation of the Act was occurring at the time the complaint is filed in order for the court to have jurisdiction to assess civil penalties for the past violations.

ARGUMENT

I. Congress gave citizen plaintiffs the authority to seek civil penalties for past violations of the Act in order to deter specifically and generally future violations.

Petitioner urges upon this Court a narrow understanding of the role contemplated by Congress for citizen enforcement actions by suggesting that "pollution abatement" is necessarily synonymous with prospective, i.e. injunctive, relief. In its brief, Petitioner cites repeatedly to the legislative history of the Act to argue that Congress intended that citizen suits be brought only to "abate" pollution. *See, e.g.*, Pet. Brief at p. 9, pp. 26-27 n. 27, and p. 29. Petitioner concludes from these citations, without further discussion, that the only way Congress intended that citizens "abate" pollution is by filing suit against continuing violators.

Petitioner also slights the significance of the unequivocal remarks of Senator Muskie, the single most important legislator with respect to the development of the Act,[3] in which he stated that, "[a] citizen has the right under Section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, *or to have been* in violation, whether the violation be a continuous one, or an occasional or sporadic one." 118 Cong. Rec. 33700 (1972) (emphasis added), *reprinted in* Cong. Research Service, *A Legislative History of the Water Pollution*

3. Petitioner suggests that this Court should accord Sen. Muskie's remarks no greater weight than due those of any individual legislator. Pet. Brief at 28. However, the Court has frequently recognized Sen. Muskie's central role in the development of the Clean Water Act and has repeatedly relied on his remarks in interpreting the Act. *E.g., Tull v. U.S.*, 55 U.S.L.W. 4571, 4574, n. 8 (Apr. 28, 1987); *Chemical Mfr's Assoc. et al.* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 140 (1985) (Marshall, J., dissenting) (quoting Sen. Muskie and identifying him as "the major drafter and Senate manager of the [1977] bill [amending the Act]"); *Environmental Protection Agency* v. *Nat'l Crushed Stone Assoc. et al.*, 449 U.S. 64, 71, n. 10 (1980) (referring to Sen. Muskie as "the principal Senate sponsor of the Act"); *E.I. duPont de Nemours & Co. et al.* v. *Train*, 430 U.S. 112, 129 (1977) (relying on Sen. Muskie's remarks in presenting the Conference report to the Senate and referring to him as "perhaps the Act's primary author"); *Train* v. *Colorado Public Interest Research Group, Inc. et al.*, 426 U.S. 1, 14 (1976) (relying on colloquy participated in by Sen. Muskie to interpret Act and referring to him as "the Act's primary author").

Control Act Amendments of 1972, 1794 (Comm. Print 1973) (hereinafter "*1972 Legislative History*"). Petitioner would have this Court understand that these remarks represent merely the isolated views of an individual legislator, Pet. Brief at 28, n. 29, and that they do not fairly characterize the kind of "pollution abatement" role Congress desired for citizen plaintiffs.

In making this argument, Petitioner ignores the broader deterrence role contemplated by Congress for Clean Water Act citizen suits. This Court has recently recognized that deterrence is a primary function of civil penalties assessed under the Act: "[t]he legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." *Tull* v. *U.S.*, 55 U.S.L.W. 4571, 4574 (Apr. 28, 1987). Petitioner is able to ignore this essential feature of the Act by confining its discussion of the legislative history to the latter stages of the Act's development, beginning with the introduction of S. 2770 and H.R. 11896 in October 1972.[4]

It is true that the debates on S. 2770 and H.R. 11896 contain little discussion of citizen enforcement actions to assess civil penalties. This is because both bills, as introduced, contained identical language authorizing citizen actions to assess penalties for past violations. S. 2770, 92nd Cong., 1st Sess., § 505(a), *1972 Legislative History* at 1704; H.R. 11896, 92nd Cong., 1st Sess., § 505(a), *1972 Legislative History* at 1074.

Congress's intentions in authorizing citizen actions to recover civil penalties for past violations can be discerned only by reviewing congressional action during the two years immediately preceding the introduction of these two bills.[5] This history provides the context for understanding Senator Muskie's remarks as a

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4. Based on the lack of significant discussion of civil penalties in the history of these two bills, Petitioner urges this Court to attach no significance to the fact that Congress gave citizen plaintiffs under the Clean Water Act an additional, potent remedy—assessing civil penalties—not available under the comparable section of the Clean Air Act, upon which § 505(a) was modelled. Pet. Brief at 27-28.

5. The correctness of this approach is demonstrated by the Senate Report on S. 2770 which explicitly referenced much of this earlier history. S. Rep. No.

succinct and accurate summary of congressional intent that Section 505(a) authorizes citizen suits for penalties, regardless of whether the violations were occurring at the time the action was initiated.

Congressional consideration of this issue in the 92nd and 91st Congresses occurred contemporaneously on two parallel fronts: (1) congressional hearings and reports on citizen enforcement of the Refuse Act of 1899; and (2) congressional hearings on the predecessor bills to S. 2770 & H.R. 11896. This history demonstrates Congress's intent to fashion an effective pollution abatement role for citizens in order to deter, both specifically and generally, violations of the Act.

In 1972, Congress amended the Federal Water Pollution Control Act out of frustration with the general ineffectiveness and limited enforcement of existing federal water pollution control laws. The Senate Committee on Public Works stated in its report on S. 2770, "[f]rom its two-year study on the Federal water pollution control program, the Committee concludes that the national effort to abate and control water pollution has been inadequate in every vital aspect." S. Rep. No. 414, *supra*, at 7, *1972 Legislative History* at 1425. The Committee was well equipped to make this statement having spent over two years holding hearings on federal water pollution control activities and considering various proposals to refashion the federal government's role. S. Rep. No. 414, *supra*, at 3-4, *1972 Legislative History* at 1421-22.[6]

Congress was particularly frustrated with governmental failure to enforce the existing laws. Senator Muskie, Chairman of the Subcommittee on Air & Water Pollution and the primary author

414, 92nd Cong., 1st Sess. (1971) 3-4, *1972 Legislative History* at 1421-22 (Committee description of 1970 and 1971 Hearings).

6. A general background of the 1972 Act and an overview of the congressional hearings that resulted in S. 2770 and H.R. 11896 can be found in H. Lieber, *Federalism and Clean Waters: The 1972 Water Pollution Control Act* 1-75 (1975).

of the Clean Water Act, summarized this congressional dissatisfaction and his remarks illustrate Congress's search for an alternative enforcement mechanism:

> The continued use of the 1948 abatement procedure also contributes to delay[; that and] the almost total lack of enforcement encourage governing bodies and officials to look for other, more direct avenues of action against water polluters and water pollution. One such approach . . . is the use of section 13 of the 1899 Refuse Act . . . .

117 Cong. Rec. 38799, (November 2, 1971).

Congressional hearings and reports from 1970 and 1971[7] demonstrate Congress's desire that past violations of the law be vigorously prosecuted to deter generally and specifically future violations of the law. Initially, the hearings and reports of Congressman Reuss's Conservation & Natural Resources Subcommittee suggested that this objective could be served by encouraging *qui tam* citizen actions to assess penalties for past

7. During this time, hearings were held and/or reports were issued by subcommittees of the Senate Public Works Committee, the Senate Commerce Committee and the House Government Operations Committee. House Comm. on Gov't Operations, *Our Waters and Wetlands: How the Army Corps of Engineers Can Help Prevent Their Destruction and Pollution*, H. Rep. No. 917, 91st Cong., 2d Sess. (1970); Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations, *Qui Tam Actions and the 1899 Refuse Act: Citizen Lawsuits Against Polluters of the Nation's Waterways*, 91st Cong., 2d Sess. (Comm. Print, Sept. 1970); *Water Pollution—1970 (Part 1): Hrgs. before the Subcomm. on Air & Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess. (April 20, 21, & 27, 1970); *The Establishment of a National Industrial Wastes Inventory: Hrg. before the Conservation and Natural Resources Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 2nd Sess., (Sept. 17, 1970); *Water Pollution Control Legislation: Hrgs. before the Subcomm. on Air & Water Pollution of the Senate Comm. on Public Works*, 92 Cong., 1st Sess. (1971); *The Refuse Act Permit Program: Hrgs. before the Subcomm. in the Env't of the Senate Comm. on Commerce*, 92nd Cong., 1st Sess. (Feb. 18 & 19, 1971); *Mercury Pollution and Enforcement of the Refuse Act of 1899 (Part 1): Hrg. Before the Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations*, 92d Cong., 1st Sess., (July 1, 1971); *Mercury Pollution and Enforcement of the Refuse Act of 1899 (Part 2): Hrgs. before the Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations*, 92d Cong., 1st Sess., (Oct. 21 & Nov. 5, 1971).

violations of the Refuse Act of 1899. This, it was hoped, would fill the vacuum created by the federal government's failure to enforce vigorously the law.

After further hearings convinced Congress that these actions would not be as effective as hoped, Congress imported a similar concept into the Clean Water Act. Based on experience under the Refuse Act and working with the citizen suit provision of the Clean Air Act as its model, Congress added citizen authority to assess civil penalties for past violations to the Clean Water Act.

A. Citizen enforcement of the Refuse Act: *qui tam* actions.

Congress's frustration with lax enforcement of federal water pollution control law and with the lack of responsiveness by the government to citizen involvement in enforcement was first manifested in oversight hearings on enforcement of the Refuse Act of 1899[8] held by the House Government Operations Committee's Conservation & Natural Resources Subcommittee in 1969-1971.[9] This subcommittee, in particular its chairman, Congressman Reuss, played a leading role in the deliberations on citizen

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8. The Refuse Act, § 13 of the Rivers & Harbors Act of 1899, 30 Stat. 1152, *codified at* 33 U.S.C. § 407, provides, in pertinent part:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited . . . any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water . . . .

This Court has construed the Refuse Act to prohibit discharges of liquid, industrial wastes (municipal sewage was excluded) and to authorize penalties, damage actions, and injunctive relief. *U.S.* v. *Standard Oil Co.*, 384 U.S. 224, 230 (1966); *U.S.* v. *Republic Steel Corp.*, 362 U.S. 482, 490 (1960); *Wyandotte Transp. Co.* v. U.S., 389 U.S. 191, 203-04 n. 15 (1967).

9. In addition to the hearings discussed in the text, *see The Establishment of a National Industrial Wastes Inventory: Hearings Before the Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 2nd Sess. (Sept. 17, 1970) (Comm. Print); *Mercury Pollution and Enforcement of the Refuse Act of 1899: Hearings Before the Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations*, 92nd Cong., 1st Sess. (July 1, 1971).

enforcement of federal water pollution control laws that led eventually to section 505(a). The Subcommittee's hearings and reports occurred at the same time as Congress was considering amendments to the Federal Water Pollution Control Act and provide the context for the development of the Clean Water Act's citizen enforcement provisions.

The Subcommittee focused national attention on the Refuse Act of 1899 as "a potentially powerful . . . weapon for combatting the pollution of [the] Nation's waters [which was] only sporadically used." House Comm. on Gov't Operations, *Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution*, H. Rep. No. 917, 91st Cong., 2d Sess. 15-18 (1970). The Refuse Act provides that any person who provides information about a violation of the Act that leads to a conviction is entitled to one-half of any fine paid. 33 U.S.C. § 411. Violators are subject to criminal prosecution and the imposition of fines of between $500 and $2500 per violation. *Id.*

In light of lax government enforcement of the Refuse Act, the Committee emphasized the potential for citizen actions to recover the informant's share of the penalty. The Committee suggested that a citizen may, where "the Government has not previously instituted a prosecution against the violator, . . . institute his own suit in the name of the United States (a *qui tam* action) to collect his moiety of the penalty." *Id.* at 17.

The Committee's report generated tremendous interest in the Refuse Act. "Many Members of Congress and many thousands of citizens [ ] asked for additional information on how to assist the Federal Government in enforcing the 1899 law and abating water pollution." House Comm. on Gov't Operations, *Enforcement of the Refuse Act of 1899*, H. Rep. No. 1333, 92nd Cong., 2nd Sess., 11 (1972). In response to the outpouring of public interest, the Subcommittee staff prepared a memorandum which described the "possible use [of *qui tam* actions] in implementing the Refuse Act of 1899." Conservation and Natural Resources Subcomm. of the Comm. on Gov't Operations, *Qui Tam Actions and the 1899 Refuse Act: Citizen Lawsuits Against Polluters of*

the Nation's Waterways; 91st Cong., 2d Sess. (Comm. Print, Sept. 1970). The memorandum surveyed the pertinent law to assess the efficacy of citizen enforcement of the Refuse Act and to encourage that such actions be filed.

Subsequently, on February 18 and 19, 1971, the Senate Commerce Committee's Subcommittee on the Environment held hearings on the Refuse Act permit program, in which Congressman Reuss and other members of the House Government Operations Committee's Conservation & Natural Resources Subcommittee participated. *Refuse Act Permit Program: Hearings before the Subcomm. on the Environment of the Comm. on Commerce, 92nd Cong., 1st Sess. (Feb. 18 & 19, 1971).* At those hearings, the Subcommittee heard testimony about enforcement of the Refuse Act, the role of citizen informants, and the need for fines substantial enough to deter violators. *Id.* at 28 & 29 (Statement of John Burns, Exec. Ass't to the U.S. Att'y for the S.D. N.Y.) ("informant's fees . . . [were] a strong inducement for people to come forward with information about the water pollution" and success in Refuse Act enforcement depended on "fines . . . substantial enough that they were somewhat a deterrent to industrial polluters"); *id.* at 74 (statement of J.G. Speth) (as a result of delays in implementing proposed Refuse Act permit program "successful citizen actions (*qui tam*) will be a practical impossibility").

Congressman Reuss's Subcommittee on Conservation & Natural Resources followed up this hearing with three additional, lengthy hearings on enforcement of the Refuse Act. *Mercury Pollution and Enforcement of the Refuse Act of 1899 (Part 1): Hearing Before the Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations,* 92nd Cong., 1st Sess., (July 1, 1971); *Mercury Pollution and Enforcement of the Refuse Act of 1899 (Part 2): Hearings Before the Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations,* 92nd Cong., 1st Sess., (Oct. 21 & Nov. 5, 1971). The government's failure to respond to citizen complaints by initiating enforcement actions was a major topic of discussion at

these hearings. Subcommittee Chairman Reuss had filed 268 complaints of Refuse Act violations with the U.S. Attorney in Wisconsin and questioned closely Shiro Kashiwa, Assistant Attorney General, Land & Natural Resources Division, about the government's failure to prosecute these violations. In particular, Congressman Reuss was concerned that his complaint about past violations by a facility which had since shut down had not led to prosecution:

> Mr. REUSS: Take Citizen Reuss, for instance, who 15 months ago said, with respect to the Du Pont Co.—and this is just one of the cases I filed—that they were dumping red chemicals into Lake Superior.... Now, you wouldn't call that a frivolous complaint; would you?
>
> Mr. KASHIWA: Of course not. But in relation to that particular plant, which we discussed a long time, *I have been informed that they have completely stopped discharging* .
>
> Mr. REUSS: They completely stopped discharging because they were afraid that someday the Department of Justice might come to life and prosecute them. They closed the plant last month.
>
> Mr. KASHIWA. Yes.
>
> Mr. REUSS: *But what about the past pollution there?* .... [W]hy don't you prosecute Du Pont for its flagrant and open violation of the Refuse Act of 1899 up to and including last month, when they stopped polluting because they closed the plant?

Mercury Pollution and Enforcement of the Refuse Act of 1899 (Part 1): Hearing Before the Conservation & Natural Resources Subcomm. of the House Comm. on Gov't Operations, 92nd Cong., 1st Sess., 37-38 (July 1, 1971) (emphasis added).

Based on its hearings,[10] the House Conservation & Natural Resources Subcommittee issued a report on enforcement of the Refuse Act. *Enforcement of the Refuse Act of 1899*, H. Rep.

10. The Report references several hearings held by the Subcommittee on the enforcement and implementation of the Refuse Act. *See* the Subcommittee hearings listed in note 7 *supra*.

No. 1333, 92nd Cong., 2d Sess., (1972). The report found that "after a slow start, the government's enforcement of the Refuse Act has been erratic, not 'vigorous'." *Id.* at 6 (upper case in original). The Committee found that the government was enforcing the Act only against egregious violators and that the Justice Department's enforcement guidelines were frustrating the efforts of enforcement-minded U.S. Attorneys.[11]

Most upsetting to the Committee was that government policy limited citizen involvement in enforcement. Citizen involvement was deemed critical by the report which concluded "the provision of the Refuse Act of 1899 specifying that one-half of any fine imposed by a court against a Refuse Act violator be paid to the citizen who gives information leading to the conviction has greatly helped enforcement of the Act." *Id.* at 10 (upper case in original). However, the Committee concluded to its dismay that "the government's policy of relying principally on efforts to persuade polluters to obey the law and using litigation as a last resort is undermining the role of citizens in enforcement of the [Refuse] Act." *Id.* at 12 (upper case in original).[12] Finally, the Committee report emphasized the importance of strict enforcement of the Refuse Act as a means of deterring generally future violations.

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11. The Department of Justice issued a guideline on June 13, 1970, which directed U.S. attorneys to bring suit "against the 'accidental or infrequent' polluter, but not against any continuing industrial discharger who is complying with ... a State or ... Federal Water Quality Administration" program. "Guidelines for Litigation Under the Refuse Act (33 U.S. Code 407)," *reprinted in The Establishment of a National Industrial Wastes Inventory: Hrg. before the Conservation and Natural Resources Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 2nd Sess., 145 (Sept. 17, 1970), despite the statutory command that United States attorneys "vigorously prosecute all offenders" of the Refuse Act. 33 U.S.C. § 413. "As a result of congressional and public objections, these guidelines were revised in April 1971 but still restrict enforcement of the act." *Enforcement of the Refuse Act of 1899*, *supra*, at 4.

12. The report found that until 1971 the Justice Department failed even to maintain records of citizen complaints under the Refuse Act. According to the report, this "failure will undoubtedly result in nonaction on many citizen complaints of violations of the 1899 law." *Enforcement of the Refuse Act of 1899*, *supra*, at 13. Moreover, the Committee found that U.S. EPA guidelines for

> The committee believes that the Corps, EPA, and the Justice Department should stand ready to prosecute, civilly or criminally, or both, any person or company where there is sufficient evidence, whether obtained by a citizen or by the Government, of violations of the Refuse Act, and that these agencies should make it clear that this is the Federal Government's policy. *A violator who knows that the Government's policy is not to sue, except where there is 'noncooperation' by the violator, or nonenforcement of State or local antipollution laws, has less incentive to take steps toward full compliance with the law.*

Id. at 23 (emphasis added).

B. Congressional hearings on predecessor bills to S. 2770 and the evolution of the Clean Water Act citizen action for civil penalties.

1. The 1970 bills & hearings.

Contemporaneously with congressional oversight hearings on the implementation of the Refuse Act and the usefulness of *qui tam* actions, Congress considered various proposals to revise drastically federal water pollution control law. Concern for spurring effective enforcement of the law by authorizing citizen enforcement is a consistent thread woven through two years of hearings and several bills.

The first bill pertinent here was introduced by Senator Muskie in 1970 and included a citizen suit provision allowing citizens to obtain declaratory and injunctive relief against violations of ambient water quality standards or of plans developed to achieve those standards. S. 3687, 91st Cong., 2d Sess. § 10(f) (1970),

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enforcing the Refuse Act, U.S. EPA, "Guidelines on Water Pollution Enforcement" 36 Fed. Reg. 13,203 (June 25, 1971), *reprinted in Mercury Pollution and the Enforcement of the Refuse Act, Part 1, supra*, at 926-28, further undermined citizen participation in enforcement due to a preference for negotiation during an administratively imposed, 180-day notice period. *Enforcement of the Refuse Act of 1899, supra*, at 14. The Committee found that such negotiations often resulted in "verbal agreements with the polluters which are kept largely secret and unavailable to public or congressional scrutiny" and which were largely unenforceable. *Id.* at 4.

reprinted in Water Pollution—1970 (Part 1): Hearings before the Subcomm. on Air & Water Pollution of the Sen. Comm. on Public Works, 91st Cong., 2d Sess. 41-42 (April 20, 21 & 27, 1970).[13] S. 3687 also contained a "bounty" provision similar to that found in the Refuse Act of 1899, which awarded one-tenth of any penalty collected by the federal government from a violator to anyone giving information leading to the conviction. S. 3687, *supra*, § 10(e)(7)(A), *reprinted in 1970 Public Works Comm. Hearings* at 37. However, informant's actions to collect their share of a penalty where the government failed to prosecute (i.e. *qui tam* actions) were not specifically authorized in the bill.

There was considerable discussion during the Committee hearings of the citizen enforcement provisions of S. 3687 and of the lack of a similar provision in the Nixon Administration's bill, S. 3471, S. 3471, 91st Cong., 2d Sess. (1970), *reprinted in 1970 Public Works Comm. Hearings* at 77-102. *See, e.g., 1970 Public Works Comm. Hearings* at 393 (opposition to citizen suit authority by Nat'l Assoc. of Mf'rs.) ("This we feel is an unnecessary additional enforcement weapon which would only lead to harassment of legitimate business and serve no justifiable end."); *Id.* at 1347 (statement in support by Philip Douglas, Exec. Sec'y, Sport Fishing Inst.) ("The penalties prescribed in S. 3687 would be a positive deterrent to the *potential polluter*, no matter how strong his financial backing, and we actively favor these provisions." (emphasis added)); *Id.* at 1662 (statement in support by David R. Zwick) ("[S. 3867 in contrast to S. 3471] addresses the problems of policing—avoiding the need for a massive Federal pollution police force by providing citizens with an incentive to participate in the enforcement process.").

Mr. Zwick's statement focused in large part on the need to enact legislation which provided an "effective deterrent to pollution violations." *Id.* at 1672. To achieve deterrence, Mr. Zwick spoke in favor of the bounty provisions of S. 3687. Responding to Mr. Zwick's testimony, Senator Muskie noted his interest in

13. Hereinafter referred to as *"1970 Public Works Comm. Hearings."*

revising the citizen suit provision of S. 3867 to make it even more effective.

> I especially like your attention to the problem of enforcement. The approach to this problem contained in S. 3687 is not one we were entirely happy with when we introduced the legislation. We are in the process of discussing the same problem in the mark-up sessions on the air pollution legislation.

Id. at 1665.

Later during the same hearing, Senator Muskie elaborated on the improvements he sought in the citizen enforcement authority:

> What we would like to see the citizen suit provision accomplish is two things: (1) act as a prod on industry, *not only on those directly subject to suit but also on others*, and; (2) act as a stimulant and, indeed, a guide to Government enforcement programs.

Id. at 1667 (emphasis added).

This discussion reveals Senator Muskie's concern that the citizen suit provision as written in S. 3687 did not fully satisfy congressional goals for such actions: it did not effectively grant citizens a remedy which would result in general deterrence of illegal pollution. These comments of Senator Muskie are consistent with, and demonstrate the significance of, his later remarks explaining the final conference committee version of S. 2770 in which he stated that citizen enforcement actions could be brought "whether the violation be a continuous one, or an occasional or sporadic one." 118 Cong. Rec. 33700 (1972), *1972 Legislative History* at 179. However, S. 3687 never proceeded beyond the hearing stage as Senator Muskie, his Subcommittee, and the Congress turned its attention to enacting the Clean Air Act of 1970.

2. The 1971 bills & hearings.

Having enacted the Clean Air Act, Congress turned its attention in 1971 back to reworking federal water pollution control

laws. Again, Senator Muskie, Chairman of the Subcommittee on Air & Water Pollution of the Committee on Public Works, took the lead. Senator Muskie introduced new legislation which, like the 1970 bill, included a citizen suit provision which authorized only declaratory and injunctive relief. S. 523, § 11(i), *reprinted in Water Pollution Control Legislation: Hearings before the Subcomm. on Air & Water Pollution of the Sen. Comm. on Public Works*, 92 Cong., 1st Sess. 193, 230-31 (1971).[14] However, S. 523 did not contain a bounty provision for informants who gave information leading to convictions for violations, an omission which was addressed later in the hearings. As in 1970, there was a competing bill supported by the Nixon Administration, but this time its bill included a citizen suit provision. S. 1014 (proposing new § 10(k) to the existing Federal Water Pollution Control Act), *reprinted in 1971 Public Works Comm. Hearings*, 306, 329-30. Neither bill authorized citizen suits to assess monetary penalties against violators.

In his opening statement, Senator Muskie acknowledged that there were some problems identified in previous hearings which were not addressed by the pending bills. He listed four examples of these problems including the need for "[p]rovisions for citizen suits to stop violations of the program under the Refuse Act of 1899." *Id.* at 2.

In the intervening period between the Muskie subcommittee's 1970 and 1971 hearings, many of the hearings and reports on enforcement of the Refuse Act of 1899 discussed earlier occurred. Not surprisingly, then, the omission of an informants' bounty provision from S. 523 did not escape attention during the hearings. In fact, it provoked a broader discussion of the need to provide citizens with an action to assess penalties where the government failed to do so. As in the previous hearings, David R. Zwick addressed this issue most thoroughly. He specifically asked the subcommittee to amend the bills to provide a *qui tam*-like action in order to deter violations:

14. Hereinafter referred to as "*1971 Public Works Comm. Hearings*".

> The most important addition the subcommittee could make to the citizen suit provision, and to the water pollution enforcement scheme in general, would be providing in the statute for a *qui tam* style action—that is, an action by a citizen to collect a fine due him when the Government does not choose to pursue the case. Such a provision is essential for several reasons. *First, the only workable deterrent against pollution is the knowledge that a penalty—stiff enough to make avoiding pollution cheaper than polluting—will be levied for past violations. If a polluter knows that the only remedy citizens have against him is an injunction to take effect in the future, there is nothing to discourage him from polluting until he is enjoined.* . . . In summary, I believe that the statutory *qui tam* action is an absolutely indispensable element in any effective citizen suit package.

Id. at 727-28 (emphasis added).

Senator Eagleton, Vice-Chairman of the Air & Water Pollution Subcommittee, was chairing that day's hearing, and he discussed with Mr. Zwick the need for citizen actions to assess penalties. *Id.* at 729-31. In that exchange, Senator Eagleton suggested that the omission of the informants' bounty provision from S. 523 was an oversight, *id.* at 729, and pressed Mr. Zwick on the kinds of penalties which citizens should be authorized to seek.

> Senator EAGLETON: In terms of fines, how do you view them, civil or criminal?
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> Mr. ZWICK: I would like to see them civil. I think that would—
>
> Senator EAGLETON: With a double damages provision, a la Sherman perhaps?
>
> Mr. ZWICK: Well, rather than damages, which are I think one of the very murky things in the environmental area, *I think the basic notion should be one of deterrence* . . . .

Id. at 731 (emphasis added).

Finally, Senator Philip Hart, Chairman of the Senate Commerce Committee, which held the Senate hearings on the Refuse Act, appeared before the Subcommittee to urge the inclusion of a *qui tam*-type citizen suit action in the legislation as a way to integrate it with citizen enforcement of the Refuse Act. *Id.* at 1019-21. In his remarks, Senator Hart referred to Congressman Reuss's efforts in the House to encourage citizen action to enforce the Refuse Act. *Id.* at 1020.

The 1971 hearings reflect Congress' appreciation that *qui tam* actions under the Refuse Act were not proving to be an effective remedy.[15] Also, these hearings demonstrate congressional understanding that the addition of citizen suit penalty authority would enhance deterrence of violations, both by the polluter being sued and by others. Therefore, it is not surprising the Senate Public Works Committee's draft print of a revised bill in response to these hearings included, for the first time, the language authorizing citizen suits to assess civil penalties—the identical language later included in both S. 2770 and H. 11896 and enacted into law as § 505(a) of the Act. Comm. on Public Works, *Federal Water Pollution Control Amendments* 44 (July 2, 1971) (staff working print) *reprinted in 1971 Public Works Comm. Hearings* 1595 (General Appendix, Sec. II).

This print of the legislation was circulated widely and numerous responses are included in the record of the 1971 hearings. Only two of these responses focused on the addition of authority to assess civil penalties to the citizen suit provision. The National Association of Electric Companies supplied for the

15. All the citizen *qui tam* actions filed in response to the attention focused upon this potential action under the Refuse Act were dismissed for failure to state a claim upon which relief could be granted, the courts holding that Congress did not confer such a cause of action on citizen informants. *Anderson* v *Norfolk & Western Railway*, 349 F.Supp. 121 (W.D.Va. 1972); *Bass Anglers Sportsman's Soc. of America* v. *Scholze Tannery, Inc.*, 329 F.Supp. 339 (D.Tenn. 1971); *Bass Anglers Sportsman's Soc. of America* v. *U.S. Plywood-Champion Papers, Inc.*, 324 F.Supp. 302 (S.D.Tex. 1971); *Enquist* v. *Quaker Oats Co.*, 327 F.Supp. 347 (D.Neb. 1971); *U.S. ex rel. Mattson* v. *Northwest Paper Co.*, 327. F.Supp. 87 (D.Minn. 1971); *U.S.* v. *Florida-Vanderbilt Development Co.*, 326 F.Supp. 289 (D.Fla. 1971).

record a marked-up copy of the working print in which the civil penalty authority is crossed out, but no explanation of their response is included. *1971 Public Works Comm. Hearings* at 1754. The American Iron & Steel Institute also submitted a marked-up copy of the working print for the record which included a marginal note next to the civil penalty authority reading,

> Section (a)(2) of the Committee Print goes well beyond the injunctive relief contemplated at the Committee hearings relating to S. 523 and S. 1014. The Print now being considered would authorize the district courts to impose the same harsh and unrealistic civil penalties [in a citizen suit] permitted in Section 309. If it is the will of the Congress that Citizen Suits are essential to the Federal water pollution control program, it would appear sufficient that the court be given the power to enjoin pollution at its source. The civil penalties should be eliminated.

Id. at 1656.

Congress did not heed the pleas of these groups and the bills introduced that fall in both the Senate and the House of Representatives (S. 2770 and H.R. 11896) included unchanged the provisions from the Committee draft authorizing courts hearing citizen suits to assess civil penalties for the past violations.

As this history indicates, Congress granted the federal district courts discretion to assess civil penalties in citizen suits out of frustration with the federal government's failure to enforce effectively the Refuse Act penalty provision. Congress recognized that assessing penalties for past violations was an essential component of abating pollution by deterring, both specifically and generally, future violations of the law. Thus, Congress created a *qui tam*-like action in which citizen plaintiffs could effectuate general and specific deterrence by suing for civil penalties. Petitioner's interpretation of § 505(a) ignores this history and would defeat those congressional purposes by denying courts the discretion to assess civil penalties in an entire class of cases, regardless of whether it would serve the general and specific deterrence goals of the Act.

II. The broad deterrent purposes of the Clean Water Act would be thwarted by a complicated jurisdictional bar to judicial discretion to assess civil penalties in the absence of continuing violations.

As the foregoing discussion of the early history of the Act reveals, Congress granted citizens authority to seek civil penalties out of frustration with the lack of government enforcement and in recognition of the need for strong citizen enforcement to deter future violations of the Act. Therefore, Congress deliberately provided citizens with an efficient remedy, based largely on self-reported violations, to assist in abating pollution.[16] However, Congress tempered the sweeping authority granted citizens to

16. A comprehensive study of citizen suits under the Clean Water Act concluded that they have a significant effect in deterring violations. Environmental Law Institute, *Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes* v-11 (Sept. 1984) ("[T]he study suggests that the current wave of citizen actions could be a significant general deterrent . . . The scope and effectiveness of the publicity generated by recent citizen enforcement seems likely to provide general deterrence."). The report concluded "that the system of citizen enforcement is currently operating as Congress intended: to provide (1) a goad and (2) an alternative to government enforcement." *Id.* at vii. It suggested that the availability of civil penalties in citizen actions—the "penalty engine"—was a major motivation for these suits and suggested that amending other federal environmental laws to authorize citizen actions to recover civil penalties would encourage citizen enforcement of them. *Id.*, at v-3.

Congress recently reaffirmed its approval of citizen actions for civil penalties by expanding the jurisdiction of district courts to assess civil penalties in citizen suits brought under the Resource Conservation and Recovery Act (RCRA), The Hazardous and Solid Waste Amendments of 1984, Pub. Law No. 98-616, § 401(b), 98 Stat. 3221, 3269, *to be codified at* 42 U.S.C. § 6972, *reprinted in* 1984 U.S. Code Cong. & Ad. News, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Superfund Amendments and Reauthorization Act of 1986, Pub. Law. No. 99-499, § 206, 100 Stat. 1613, 1703-05, *to be codified at* 42 U.S.C. § 9659, *reprinted in* 1986 U.S. Code Cong. & Ad. News (Dec. 1986 Advance ed.), and did so by using the same language as CWA § 505(a). In describing the 1986 amendments of CERCLA, Sen. Baucus (the author of the civil penalty amendment) explained his proposal by reference to the Environmental Law Institute study of Clean Water Act citizen suits. Sen. Baucus concluded, as did the Environmental Law Institute report, that "the system of citizen enforcement is currently operating as Congress intended" and that "the scope and effectiveness of the publicity generated

enforce against *all* violations of certain provisions of the Act, regardless of their significance, by granting federal district courts discretion in fashioning the appropriate relief. *See Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 318 (1982) (courts have discretion in fashioning equitable relief for violations of the Act "to order relief that will achieve *compliance* with the Act." (emphasis in original)).

While Congress intended that the determination of violations in citizen actions be simple and expeditious,[17] the factual inquiry necessary to determine the appropriate remedy is significantly more complicated.[18] Petitioner would have this Court require that district courts make complicated factual findings on many of the remedial-type considerations specified by Congress as a jurisdictional matter in determining whether a citizen action for penalties may proceed. Moreover, where, based on this complicated inquiry, continuing violations were found not to exist, Petitioner would bar courts from serving the deterrent purposes of the Act

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by recent citizen enforcement seems likely to act as a general deterrent." 131 Cong. Rec. S12026 (daily ed. Sept. 24, 1985).

17. *See* Sen. Rep. No. 414, *supra*, at 64, 65, 79, 80 & 81, *1972 Legislative History* at 1482, 1483, 1497, 1498 & 1499.

18. In the recent amendments to the Act, Congress specifically listed several considerations to be taken into account by district courts in determining appropriate civil penalties for violations of the Act. Section 313 of the Water Quality Act of 1987, Pub. Law No. 100-4, 101 Stat. 7, 45, *reprinted in* 1987 *U.S. Code Cong. & Ad. News* (March 1987 advance ed.) provides:

> Section 309(d) is amended by adding at the end thereof the following: "In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. . . ."

The considerations listed by Congress are all specific factors relevant to determining the penalty amount necessary to deter, both generally and specifically, future violations. *See* EPA, "Clean Water Act Civil Penalty Policy" (Feb. 11, 1986); EPA, "Civil Penalty Policy" [Federal Laws] *Env't Rep.* (BNA) 41:2991 (June 1, 1984) discussed in detail by the court below, *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield, Ltd.*, 611 F.Supp. 1542, 1556-57 (E.D. Va. 1985). In general, these policies separate the inquiry into three phases: (1) calculating the statutory maximum penalty; (2) determining the "primary deterrence" figure; and (3) considering other factors.

by awarding civil penalties, no matter how egregious the admitted violations.

The specific facts of this case, as set forth in detail by the district court, demonstrate precisely how such a jurisdictional bar would frustrate enforcement of the Act. All of the mitigating factors cited by Petitioner to excuse its admitted violations of the Act, Pet. Brief at pp. 4-6, p. 9 & p. 21 were thoroughly considered by the district court in determining the appropriate civil penalty. *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield, Ltd., supra,* 611 F.Supp. at 1556-65. The court found unpersuasive Gwaltney's attempts to "trivialize[] the seriousness of its fecal coliform violations," *id.* at 1560, it found that Gwaltney dealt with the known violations "in an exceedingly unconcerned manner" with an attitude that "borders on benign neglect," *id.* at 1561, and it increased the penalty because "Gwaltney's lackadaisical approach in correcting a problem that posed risks . . . to both human health and aquatic life should not be countenanced . . . ." *Id.*

Petitioner does not reiterate its many excuses for the admitted violations before this Court to suggest that the district court abused its discretion in fashioning a remedy. Instead, Petitioner asks this Court to bar the exercise of such discretion in all citizen actions where the violations have ceased by the time the complaint is filed. Petitioner, and others clever enough to await the filing of a citizen suit notice and cease violating the Act prior to the filing of the complaint, would escape punishment. The deterrent purposes of the Act and the integral role of citizen suits in abating pollution would be significantly undermined.

III. Conclusion

Therefore, the Court should affirm the judgment of the U.S. Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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